

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 565-5330
(202) 565-5325 (FAX)



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Date Issued: 08/12/99

Case No.: **1999 INA 053**

In the Matter of:

**MAJESCO SOFTWARE, INC., d/b/a/
MSI MAJESCO SOFTWARE**, Employer,

on behalf of

SANJAY TAPIDES MODI, Alien.

Certifying Officer: R. M. Day, Region IX.

Appearance : E. J. White, Esq., of San Jose, California, for the Employer and Alien

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application filed on behalf of SANJAY TAPIDES MODI ("Alien") by MAJESCO SOFTWARE, INC., d/b/a/ MSI MAJESCO SOFTWARE, ("Employer") under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act") and the regulations promulgated thereunder, 20 CFR Part 656.¹ After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer requested review pursuant to 20 CFR

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the *Dictionary of Occupational Titles*, published by the Employment and Training Administration of the U. S. Department of Labor.

An alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa under § 212(a)(5) of the Act, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the Alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the state employment security agency and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

Application. On July 19, 1996, the Employer applied for alien employment certification on behalf of the Alien to fill the position of "Software Engineer." AF 122. The position was classified as a "Software Engineer" under DOT Occupational Code No. 030.062-010.³ Employer described the Job Duties as follows:

Develop software for GUI/RDBMS projects. Duties include: Perform feasibility studies, design GUI, and develop s/w & testing procedure and networking.

AF 13, box 13.⁴ As its Other Special Requirements, Employer's Form ETA 750A said that the

² After the date of application, the Employer, formerly known as Mastek Software, Inc., restated its name as Majesco Software, Inc. AF 66-67.

³030.062-010 **SOFTWARE ENGINEER** (profess. & kin.) Researches, designs, and develops computer software systems, in conjunction with hardware product development, for medical , industrial, military, communications, aerospace, and scientific applications, applying principles and techniques of computer science, engineering, and mathematical analysis: Analyzes software requirements to determine feasibility of design within time and cost constraints. Consults with hardware engineers and other engineering staff to evaluate interface between hardware and software, and operational and performance requirements of overall system. Formulates and designs software system, using scientific analysis and *mathematical models* to predict and measure outcome and consequences of design. Develops and directs software system testing procedures, programming, and documentation. Consults with customer concerning maintenance of software system. May coordinate installation of software system. *GOE: 11.01.01 STRENGTH: S GED: R5 M5 L5 SVP: 8 DLU: 90*

⁴RDBMS is a relational database management system that is used for network based client server computing. The data base is perceived by its users as a collection of tables. By cross indexing the data record into giant matrixes, the software makes finding specified records easier. SQL means structured query language. GUI stands for Graphical User Interface, a type of software program. An SQL server is an RDBMS system that is based on SQL, a language used to insert relational statements into the data base. Such statements define and manipulate the data in the database. SQL* Forms, SQL* Report Writer, and PL/SQL are types of Oracle tools. Cobol Pascal, and C are types of programming languages. TCP/IP incorporates types of protocols. All of these are related to software development and testing of software. Power/Builder and SQL Windows are Windows/GUI tools used in GUI design. UNIX, VMS, and AOS are

qualify for the position applicants

Must have background with Oracle, Ingres, Informix, & GUI; Knowledge of SQL* Forms, SQL* ReportWriter, PL/SQL, COBOL, PASCAL, C, UNIX, VMS, AOS, LAN/WAN, TCP/IP, Powerbuilder, SQL Windows.

Id., box 15. The Education requirement was a Bachelor of Science degree or equivalent in Computer Science or Electrical Engineering. No other training or work experience was specified. *Id.*, box 14. This was a forty hour a week job from 9:00 AM to 6:00 PM, with no provision for overtime at an monthly salary of \$4,200. *Id.*, boxes 10 -12.⁵ Although five apparently qualified U. S. workers responded to Employer's recruitment effort, it did not hire any of them. AF 61.⁶

Notice of Findings. On October 21, 1996, the Notice of Findings (NOF) concluded that, subject to rebuttal, the Employer failed to establish entitlement to certification. AF 54-60.

(1) Pursuant to 20 CFR §§ 656.21(b)(2)(i)(A), 656.21(b)(7), and 656.21(g), the NOF said the Employer's hiring requirements were unduly restrictive in that they were not normally required for the successful performance of the job in the United States and would preclude the referral of otherwise qualified U. S. workers. The NOF discussed the Other Special Requirements stated in the Application at AF 62 in box 15, observing that the Job Offered is an entry level position requiring no work experience, and that the qualifying educational requirements are a Bachelor of Science degree in Computer Science or Electrical Engineering. The NOF took note of the explanation of its job requirements that the Employer's attorney provided to the state employment security agency ("state agency") and observed that, "The common element in the employer's clarification of the above mentioned 'background' and 'knowledge' requirements is the statement 'are needed to perform successfully the ... duties of the offered position.'" AF 56, referring to AF 76-77. Finding these references to background and knowledge insufficient to establish their necessity, the NOF directed Employer to cite and explain the specific reasons relating such qualifications to the performance of the job duties. Moreover, said the NOF, because there is no

types of computer operating systems. LAN/WAN stands for Local Area Networking and Wide Area Networking.

⁵ A national of India, the Alien was born 1966 and earned a baccalaureate degree in the Science of Engineering with a Major in Electrical Engineering in 1987. From July 1987 to May 1993 the Alien was a project leader for Mastek Limited, a Software Development business located in India. From May 1993 to the date of application, the Alien was employed as a software engineer by Mastek Software, Inc., in Santa Clara, California, where his duties were substantially the same as the Job Offered. From May 1993 to the date of application, the Alien has lived and worked in the United States under an H-1B visa. AF 127-128. The H-1B visa category is for persons with extraordinary ability who are qualified to perform services in specialty occupations, largely professions. See Act §§ 101(a)(15)(H), 212(m), 212(n), 214(g), (h) and (i). See 8 CFR §§ 214.2(h)(4)(ii) and 214.2(h)(4)(iii), as amended, 55 Fed. Reg. 2,623 (Jan. 26, 1990), and renumbered, 55 Fed. Reg. 34,895, 34, 897 (Aug. 27, 1990). Also see H.R. Rep. No. 723, 101st Cong., 2d Sess. 67 (1990) reprinted in 1990 U.S. Code Cong. & Admin. News 6710.

⁶ The job applicants included Mr. Tran and Mr. von Bergen. The evidence relating to their qualifications and their rejections will be found at AF 82-84, 96, 105-102, 107-111..

requirement of job experience the worker does not have to know how to perform the job duties before he is hired, since the educational requirements suffice to demonstrate the ability to apply the requisite knowledge and the customary probationary period should be sufficient to learn the other skills the position demands. The NOF added in (2) that the Employer's advertisement lacked specificity, as its text failed to describe the job with particularity. Although it is an entry level position that required no experience, the Employer's statement of the skills it required for this job was misleading and discouraging to otherwise qualified U. S. workers. Finding that the Employer's Description of Job Duties, Job Requirements, and education and experience qualifications was inconsistent with the known employment practices of the Employer, as well as with the hiring criteria common to the position in the United States, the NOF directed the Employer either to amend and readvertise the job opportunity without those unduly restrictive requirements or to present evidence that such restrictive requirements were a business necessity. AF 56-58.

(3) Citing 20 CFR § 656.24(b)(2)(ii), the NOF said Mr. Tran and Mr. von Bergen, two of the U. S. job applicants, apparently met the employer's minimum job requirements, within the meaning of 20 CFR §§ 656.21(b)(2)(i)(A), 656.21(b)(7), and 656.21(g). After the NOF described the specific elements of education, training and experience they offered, it said as to each of them that, "With the applicant's extensive experience and education [he] is qualified for this entry level position. His background indicates the ability to perform the duties of this position." AF 59. (4) Based on 20 CFR § 656.21(b)(7), the NOF recited the Employer's description of its attempts to reach Mr. Tran and then stated his reply to the state agency questionnaire in which he reported that the Employer failed to respond to his attempts to reach the person in its office who was responsible for scheduling a job interview. Turning to Mr. von Bergen's answer to the state agency questionnaire, the NOF noted that in reporting his experience he said that he felt he was qualified for the job and

that from the onset of discussions with the company I was apprised that it is against company policy to hire people in the United States. I was informed that programmer/analyst and software engineers are brought to the varying locations this company maintains (primarily in the U.S. and some Pacific Rim sites) from exclusively India. I was made to understand that if an American was hired it be as a matter of tokenism to attempt to placate government representatives.

AF 59-60. By way of rebuttal the Employer was told to prove that it engaged in good faith recruitment for this position by presenting evidence in support of its representations, that it made a good faith effort to contract Mr. Tran, and that Mr. von Bergen was not qualified for the job for reasons that were lawful and job related.

Rebuttal. Employer's rebuttal was filed on November 18, 1996. It consisted of a letter signed by its Engineering Manager, who asserted that all of the "Other Special Requirements" that its Form ETA 750A stated were "minimum requirements." The Employer observed that the United States corporation, Majesco Software, Inc., ("MSI") is a subsidiary of Mastek Limited of

Bombay, India ("MPL"), which had been in business over fourteen years at the time the rebuttal was filed. The Alien was a Project Leader in Software Development after completing nearly six years of employment with Mastek Limited, the Employer's parent firm. AF 17, 128.

The Employer's Engineering Manager contended that entry level positions such as this could require minimum requirements, and explained that applicants for this job could acquire the skills specified in its Application while fulfilling university project requirements to earn an undergraduate degree. The Engineering Manager explained that it was not the Employer's practice to hire engineers who needed extensive training before being placed on a project, and that the familiarity with the languages, tools, and systems described in the Other Special Requirements that its Application required as "background" were, in fact, professional skills that the Employer regarded as critical to its performance of software development services for its customers. Compare AF 13, box 15.

The Employer's Engineering Manager then rejected the NOF instructions to prove that all of its Software Engineers are qualified with the Other Special Requirements it listed in the Form ETA 750A. He explained that the skills of the individual Software Engineers must vary because teams of Software Engineers are assigned to a variety of different applications and operating systems projects. Taking note of the Alien's status as one of the Project Leaders in one of its Software Development teams, the Engineering Manager asserted that each of his team members was qualified as described in the Other Special Requirements when hired.

In arguing that its advertisement was not misleading, the Employer said that it had mentioned the "Other Special Requirements" as minimum requirements. AF 23. For this reason the Employer said it rejected both Mr. Tran and Mr. von Bergen for lawful, job related reasons, because they lacked the Other Special Requirements. The Employer argued that it was not necessary to interview Mr. Tran, since he was not qualified and that the requisite qualifications were not found in Mr. Tran's resume, despite its failed effort to contact him,. AF 23-24. The Engineering Manager admitted that the Employer also called Mr. von Bergen, but contended that its sole purpose was to request his resume. Although the Engineering Manager did not make the call or indicate that he heard the conversation, he denied that the Employer had "interviewed" Mr. von Bergen, or that it had made the admissions regarding company policy that Mr. von Bergen described in his reply to the state agency questionnaire. The Engineering Manager then argued that the CO was "legally bound to accept our version of the events over Mr. von Bergen's version," citing **Kogan and Moore Architects, Inc.**, 88 INA 500 (Oct. 31, 1989). AF 25.

Final Determination. On January 17, 1997, the CO denied certification in the Final Determination. AF 12-15. The CO reviewed the Employer's rebuttal and, because several of the Engineering Manager's assertions of fact were not supported by persuasive evidence, the CO rejected Employer's contentions (1) that "MSI has teams 'of Software Engineers to program software for different applications and operating systems projects," (2) that "All members possess a minimum of a Bachelor's degree or equivalent," and (3) that "At time of hire, each member possessed background with Oracle, Ingres, etc." The CO explained that the Employer's

unsupported allegations were insufficient to prove that the Other Special Requirements were minimum requirements that its other software engineers possessed at and before the date they were hired, as its rebuttal failed to disclose whether those other members of the Alien's team were formerly employed by its parent corporation in Bombay before being placed on the Employer's payroll, whether such members of the Aliens' team were entry level employees when hired, or the level of their skills in the "Other Special Requirements" when each of them was an entry level employee, and at what stage of their careers those workers were hired by the parent and subsidiary members of the firm. The CO said Employer failed to justify its unduly restrictive Other Special Requirements and did not provide the evidence that the NOF requested to show that the Employer's other software engineers possessed all of the skills it characterized as "background" before it hired them. The CO further found that the Employer's recruitment advertisement lacked specificity. The Final Determination rejected Employer's assertions that argued but did not support its contentions (1) that all the job duties it listed were specific and proper, (2) that its recruiting advertisement did not need to state "no experience required" and thus was not misleading, and (3) that the NOF failed to follow standard DOL processing procedures. The CO concluded that the Employer's rebuttal was not responsive to the requests for specific evidence stated in the NOF.

After discussing the finding that both Mr. Tran and Mr. von Bergen were considered able and qualified for the job opportunity on the basis of their education, training, experience, or a combination of these factors, the CO turned to the NOF directions to present evidence supporting the Engineering Manager's assertions (1) that it made a good faith effort to contact Mr. Tran and (2) that Mr. Von Bergen was not qualified for the position due to job-related reasons. After examining the standards to be followed in appraising responses of applicants to state agency questionnaires, the CO concluded that Employer failed to show that Mr. von Bergen was not qualified for the position for reasons that were lawful and job related. The CO explained that the reasons given in the Employer's rebuttal simply repeated the specific requirements that were found unduly restrictive, observing that these were not "the true minimum requirements" that were stated in its Application for certification. Concluding that the Employer's rebuttal of the NOF deficiencies was unpersuasive and insufficient, the CO denied certification. AF 15.

Appeal. On February 10, 1997, the Employer appealed from the CO's denial of certification. AF 01-07. Observing that it had elected to argue the business necessity of the restrictive requirements, Employer's attorney noted that the Final Determination failed to consider or rely on the excerpts of documents filed in other certification proceedings that it offered as evidence in support of the rebuttal contentions. The Employer further contended that the CO did not consider Employer's argument that at time of hire the individual members of its teams of Software Engineers possessed the baccalaureate degree and the skills specified as Other Special Requirements in its Application. Counsel argued that the specialties of the Employer's project teams differed, and that it was "not logical nor proper for the employer to be expected to establish that Engineers from other teams were required to possess the skill set" that its Form ETA 750A required in this case. Instead, Counsel continued,

The proper focus is for DOL to examine the other MSI employees on the alien's team. The only practical method of limiting the inquiry on this point is for the employer to provide the resumes of fellow MSI employees working for the alien's team. The employer will provide the Board with resumes from the alien's team members with its final submission.

The Employer then repeated arguments based on documents that are not part of this record to contend that many of its requirements were specifically mentioned as relevant skills in such manuals, contending that because the Certifying Officer of Region IX had once mentioned such sources in the context of a public address discussion of the certification process, the quotations it excerpted from those books were "special requirements and not restrictive." The Employer then concluded, "Since the NOF specifically asked the employer to show that its employee possessed restrictive requirements, the employer's NOF rebuttal was responsive."

Turning to the CO's finding that the recruiting advertisement lacked specificity, the Employer stated its version of what 20 CFR § 656.21(g) required the advertisement to contain, as first stated in its rebuttal, arguing, .

Presumably, an Engineer who would confused the words following '**duties include**' with the words following '**Min. Req.**' would not be able to perform the duties of the offered position. Highly educated, professional Engineers are not going to be confused because the job description came at the top rather than at the end of the advertisement. Engineers reading the ad do not have to be told that 'no experience is required.' They can read the explicit language of the ad (which did not require experience) and make that determination..

AF 05. (Quoted verbatim without change or correction. Emphasis as in original.) The Employer conceded that the CO correctly found that it tried to interview Mr. Tran, but failed to do so for reasons that were his fault. The Employer contended that in spite of its attempt to interview Mr. Tran, it was not required to interview him because his resume failed to present its minimum qualifications to perform the duties of the position it offered, arguing that this was evidence of its good faith recruitment effort. In closing the Employer argued that it rejected all of the job applicants, including both Mr. von Bergen and Mr. Tran, on grounds that they failed to meet its other special requirements and that the CO's finding of any other reason was erroneous.

Discussion

The issues. The issues are (1) whether the Employer's special requirements were unduly restrictive under 20 CFR § 656.21(b)(2)(i)(a) where the Employer's hiring criteria required only a baccalaureate degree and no further training or experience, (2) whether the Employer rejected qualified job applicants, and (3) whether the Employer engaged in good faith recruitment for the job opportunity it offered.

Unduly restrictive requirements. To insure that a job opportunity is available to qualified U. S. workers, the regulations prohibit the use of unduly restrictive job requirements in the recruitment process, as such qualifications have a chilling effect on the number of U.S. workers who may apply or qualify for the position. See generally **Venture International Associates, Ltd.**, 87 INA 569 (Jan. 13, 1989)(*en banc*). While an employer may adopt any qualifications it may fancy for the workers it hires pursuant to its usual business practices, an employer seeking to apply such hiring criteria to U. S. job seekers in the course of testing the labor market pursuant to an application for alien labor certification must comply with the Act and regulations. This is particularly the case where, as in this Application, Employer's Other Special Requirements are weighed under 20 CFR 656.21(b)(2)(i)(a), which explicitly provides that unless adequately documented as arising from a business necessity, it must document that its hiring qualifications for the position are not more restrictive than those normally required for the performance of the job in the United States. The restrictive requirement at issue in the Final Determination and in Employer's appeal was the Employer's specification of skills that exceeded the undergraduate coursework required for award of a Bachelor of Science degree in Computer Science or Electrical Engineering. Although Employer referred to such skills as "background" and repeatedly argued that these were its minimum requirements, a question remains as to whether such hiring criteria were unduly restrictive.

Burden of proof. Alien labor certification is an exception to the general operation of the Act, by which Congress provided favored treatment for a limited class of alien workers whose skills were needed in the U. S. labor market. Consequently, the burden of proof must be borne by the parties seeking alien labor certification. 20 CFR § 656.2(b) quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on applicants for alien labor certification. "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." Based on the provisions of the Act, the regulations, and the legislative history of the 1965 amendments to the Immigration and Nationality Act, it is clear that Congress intended that the burden of proof in an application for labor certification should rest on the employer seeking an alien's entry into the United States for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. & Ad. News 3333-3334. Consequently, the Panel must strictly construe this exception, resolving all doubts against the party invoking this exemption from the general operation of the Act. 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

Analysis and conclusion. We can best determine this Employer's minimum requirements by examining the Alien's qualifications at the time the Employer hired him, as an employer's stated hiring criteria for a job opportunity may be found not to be its actual minimum requirements under 20 CFR § 656.21(b)(6) where an alien did not possess the necessary experience before he was hired by an employer. **Super Seal Manufacturing Co.**, 88 INA 417 (Apr. 12, 1989)(*en banc*). Although Employer's Application required no experience, the

Appellate File has established that before he was hired by the Employer, the Alien worked for nearly six years in the employment of the Employer's parent company. Having risen from entry level worker to Project leader while working for the Parent entity, he appears to have been promoted from Project Leader to Software Engineer when the Employer hired him. The Employer seems to argue, nevertheless, that the vocational skills the Alien acquired while working for its parent company during the six years after the award of his a Bachelor of Science degree in Electrical Engineering should be treated as academic "background," even though his professional skills when the Employer moved him from the parent company's work force in India to the payroll of its United States subsidiary were materially greater than his skills on the date he graduated from the University of Bombay.⁷

The NOF. The requirements that the CO considered unduly restrictive were, "Must have background with Oracle, Ingres, Informix, & GUI; Knowledge of SQL* Forms, SQL* ReportWriter, PL/SQL, COBOL, PASCAL, C, UNIX, VMS, AOS, LAN/WAN, TCP/IP, Powerbuilder, SQL Windows." AF 62, box 15. Finding the Employer's Description of Job Duties and Job Requirements inconsistent with its education, training, and experience qualifications, with the Employer's hiring practices, and with the hiring criteria common to the position in the United States, the NOF directed Employer either to amend and delete the unduly restrictive hiring criteria and readvertise the position or to present evidence that its Other Special Requirements were a business necessity. AF 56-58.

Rebuttal. The assertions of fact in the Employer's rebuttal were offered by its Engineering Manager, whose credentials and knowledge of the Employer's business and employment practices were not established. While the Engineering Manager's written statement was documentation that must be considered under **Gencorp**, 87 INA 659 (Jan. 13, 1988)(*en banc*), his bare assertions with neither explanation nor factual support were insufficient to establish either that the Employer's restrictive job requirements were normal for this position or that they were supported by business necessity. **Inter-World Immigration Service**, 88 INA 490 (Sep. 1, 1989), citing **Tri-P's Corp.**, 88 INA 686 (Feb. 17, 1989). The Panel has weighed the statement of the Engineering Manager pursuant to criteria that follow: the surrounding facts and circumstances, the source of the Engineering Manager's knowledge, the interest of the Engineering Manager in the outcome of the case, the good or bad intentions of the Engineering Manager, the manner of the Engineering Manager's testimony, and other indices of the honesty or credibility of the Engineering Manager. **Mr. and Mrs. Jeffrey Hines**, 88 INA 510 (Apr. 9, 1990). See also **Carl Joecks, Inc.**, 90 INA 406 (Jan. 16, 1992). Moreover, the Employer's argument further relied on statements of its attorney which were not supported by the underlying statements of a person with knowledge of the facts, and for this reason such statements were not evidence. **Moda Linea, Inc.**, 90 INA 424 (Dec. 11, 1991). As the Board had explained in **Yaron Development Co., Inc.**, 89 INA 178 (Apr. 19, 1991)(*en*

⁷The panel's analysis of this record is guided by the Board's holding that each case involving a challenge to an employer's standing as a separate entity must be examined on its own record. **Inmos Corp.**, 88 INA 326 (Jun. 1, 1990)(*en banc*).

banc), a factual theory presented by counsel in a brief cannot serve as evidence of material facts.⁸

Since the Employer required no experience or training beyond the specified a Bachelor of Science degree in Computer Science or Electrical Engineering, the NOF defined the job offered as an entry level position, a finding that was not challenged by the Employer in either the rebuttal or the appeal. In directing the filing of specific, verifiable evidence concerning its normal hiring practices and its actual minimum requirements to fill this job, the NOF told the Employer to submit documentation showing that at the time they were hired the company's other software engineers possessed the skills it described as its "Other Special Requirements." As these skills, which the Employer described as "background," were not included in the DOT occupation description for a Software Engineer, the NOF requests were germane to the CO's determination of the availability of qualified U. S. workers.⁹

The Employer's burden of proof required it to provide the resumes of fellow MSI employees working for the Alien's team as evidence supporting its Application. Instead, the Employer's appellate argument explained that the Software Engineers it normally hired did not have to meet such specifications because having a single minimal standard qualification level was inconsistent with its own practice of assigning employees to teams engaged in projects involving the design of a variety of applications and operating systems, each of which demanded different skills. On the other hand, the Employer added, each member of the Alien's team did have the skills described in its Other Special Requirements at the time he was hired. Employer then conceded that proof of this contention would require the CO "to examine the other MSI employees on the alien's team."

At this point the Employer offered the evidence omitted from its rebuttal, which failed to furnish documentation in the Employer's possession that the NOF requested as proof that at the time they were hired its other software engineers possessed the skills that it had described as "Other Special Requirements". Employer's appellate arguments noted this and belatedly offered the documentation as new evidence. As such proposed additions to the Appellate File were not before the CO at the time the Application was considered and rejected, its offer is untimely and such evidence cannot be addressed in this review of the denial of certification. 20 CFR §§ 656.26(b)(4) and 656.27(c). See **O'Malley Glass & Millwork Co.**, 88 INA 049 (Mar. 13, 1989); **Universal Energy Systems, Inc.**, 88 INA 005 (Jan. 4, 1989).¹⁰

⁸ The Employer's repeated references to statements that the Certifying Officer is alleged to have made in an unrelated context are similarly undocumented were not proven by the Engineering Manager's statement. The Board would not be bound by the CO's interpretation of the law even if proven to have been uttered, however. **Tedmar's Oak Factory**, 89 INA 062 (Feb. 26, 1990).

⁹ See footnote #3.

¹⁰ See also **Capriccio's Restaurant**, 90 INA 480 (Jan 7, 1992); **Kelper International Corp.**, 90 INA 191 (May 20, 1991); **Kogan & Moore Architects, Inc.**, 90 INA 466 (May 10, 1991). For more recent cases see **Sidhu Assoc., Inc.**, 95 INA 182 (Jan. 2, 1997); **Roy Lipman Org., Inc.**, 95 INA 071 (Jul. 26, 1996); **Schroeder Brothers Co.**, 91 INA 324

As the Employer conceded that its rebuttal failed to provide this evidence, which was critical to the proof of its argument, this admission against interest materially supported the denial of certification. The Employer not only failed to provide the names, work assignments, and hiring level qualifications of the members of the Alien's own team or of any other project team in its organization to support its argument, but its rebuttal failed to describe its system of managing its software engineers as teams in either the United States operation or the Indian operation of its own business. Finally, the Employer did not supply evidence that the Employer's requirement of such qualifications for an entry level Software Engineer position was common among the other employers filling similar positions in the United States. For these reasons the Panel concludes that the Employer did not support the Engineering Manager's rebuttal statements with documentation that its management practices and hiring criteria in this Application were consistent with the practices generally followed by this industry in the United States.

Business necessity. The Employer's statement that its Other Special Requirements represented its minimal job requirements has been further examined in this context to determine whether the evidence in the Appellate File established its requirement of these skills as a business necessity. The Engineering Manager did not persuasively explain how the specified "background" and "knowledge" that exceeded a Bachelor of Science degree in Computer Science or Electrical Engineering related to the performance of the normal duties of an entry level worker in this job. Although the Engineering Manager said that entry level positions such as this demanded the skills it characterized as minimum requirements because applicants for this job could acquire the skills specified in its Application while fulfilling university project requirements to earn an undergraduate degree, this assertion was not supported by the qualifications in the Alien's Form ETA 750B.

Alien's qualifications. Although the Alien alleged that his project work and classroom studies gave him background in Oracle, Ingres, Informix, & GUI; Knowledge of SQL* Forms, SQL* ReportWriter, PL/SQL, COBOL, PASCAL, C, UNIX, VMS, AOS, LAN/WAN, TCP/IP, Powerbuilder, and SQL Windows, the academic curriculum supporting Alien's qualifications showed no evidence of studies that either required or provided him with any such background.¹¹ The courses he took were standard for a Bachelor of Science degree in Electrical Engineering. AF 136-144. From September 1986 to May 1987 during his final year at the University of

(Aug. 26, 1992). For general discussion see **Construction and Investment Corp.**, 89 INA 055 (Apr.24, 1989)(*en banc*).

¹¹The curriculum courses that the Alien took in earning a degree of Bachelor of Science in Electrical Engineering of the University of Bombay were the following: Applied mathematics, applied physics, applied chemistry, engineering drawing, engineering mechanics, communication skills, basic workshop practice, basic electricity and electronics, engineering drawing, electrical circuit, electrical material science, heat power engineering, electrical instrumentation, strength of materials, hydraulics & hydraulic machinery, electrical machines, basic electronics, theory of machines and machines design, electromagnetic fields, basic control systems, industrial economics, industrial organization and management, electrical power system engineering, elements of communications system, electronic instruments, design of basic electronic circuits, principles of electrical design, numerical methods and Fortran programming, electrical drives and control, elective I, elective II, and project work. AF 136-144.

Bombay the Alien took computer classes that included COBOL in "Agrawal Classes" ("Ideal for Scholars"), an institution that was not shown to have been connected with the award of his Bachelor of Science degree by the University of Bombay. 145-146. Moreover, the Alien's Form ETA 750B admitted that his Bachelor of Science degree in Electrical Engineering from the University of Bombay was the equivalent of a Bachelor of Science degree in Electrical Engineering from an accredited college or university in the United States and that the Agrawal Classes were equivalent to technical computer training courses from a private organization in the United States.¹² AF 134. For these reasons the Appellate File does not contain persuasive evidence that the Alien's project work and classroom studies gave him the background in Oracle, Ingres, Informix, & GUI; Knowledge of SQL* Forms, SQL* ReportWriter, PL/SQL, COBOL, PASCAL, C, UNIX, VMS, AOS, LAN/WAN, TCP/IP, Powerbuilder, and SQL Windows that he alleged in Form ETA 750B, box 15c at AF 128.

Parent company. The required skills, whose lack the Employer cited as its reasons for rejecting the resumes of both Mr. Tran and Mr. Von Bergen, were acquired by the Alien after he was awarded a Bachelor of Science degree in Electrical Engineering following his studies at Bombay University. He did not learn any of those skills as part of his undergraduate curriculum and, except for COBOL, which he learned outside of the academic coursework. Between the date of his graduation from the University of Bombay in 1987 and the date this application was filed the Alien was working for the Employer's parent corporation, Mastek Limited, India, where he was promoted to Project Leader, and for the Employer, which placed him on its payroll as a Software Engineer. After Employer and the parent firm hired him, time the Alien actively used SQL Windows, Informix, a GUI/RDBMS based applications system, Powerbuilder, Oracle, Ingres, Informix, GUI, TCP/IP, LAN/WAN, SQL* Forms, SQL* ReportWriter, PL/SQL, PASCAL, VMS, UNIX, AOS, AOS, and C in the course of executing several projects for both of these companies. It follows that all of the skills the Application listed as Other Special Requirements were acquired in the course of his employment by the Employer and its parent company, where the Statement of Qualifications expressly admitted that the Alien acquired the requisite experience to meet the Other Special Requirements. AF 131-133.

As he never worked for any other employer, the Employer has failed to show that the Alien learned the required computer expertise before the date the parent company hired him out of the University of Bombay, the Alien began as an entry level employee and became a Project Leader while he was working for the Employer's parent company before being added to the Employer's work force as a Software Engineer. Because there is no evidence of any other training or employment experience after his academic degree was conferred by the University of Bombay, it is concluded that the Employer's parent company hired the Alien as an entry level employee without the "background" the Employer's Application required of U. S. workers, that he acquired the requisite professional "background" while working for the parent company, and that he was hired by the Employer because his "background" with the parent firm had raised his professional skills materially beyond the level of the skills with which he graduated the

¹²The work was tested and graded in Computer Fundamentals, BASIC, COBOL, and Elements of Systems Analysis and Design. Dbase III and Lotus 123 were given the work was not tested.

University of Bombay.

Summary. The Employer's minimum qualifications must be determined on the basis of the Alien's own qualifications at the point immediately before he began to accumulate experience in this occupation. Construed in their entirety, the hiring criteria are limited by Employer's educational requirements which specified no experience beyond a job applicant's Bachelor of Science degree in Computer Science or Electrical Engineering. The Alien's statement of qualifications and supporting evidence do not support a finding that he acquired the Other Special Requirements before he completed his academic courses, except for the training in COBOL that he took while an undergraduate student by attending classes in an institution that had nothing to do with Bombay University or his academic curriculum. Even if the Panel gave consideration to his COBOL skills, however, the Employer rejected U. S. job applicants who also had this background, but did not have the further training that the Alien acquired after he went to work for Employer's parent company, notwithstanding the unsupported assertions to the contrary in his Statement of Qualifications.

Finally, the Employer failed to present any evidence of the qualifications it ordinarily required of employees it hired with no experience as Software Engineers. The record contains no proof of a single minimal standard qualification level that the CO could find the Employer applied in hiring for this occupation. The Employer dismissed such a practice as inconsistent with the hiring methods that it historically used in setting up project teams composed of employees with a variety of skills in applications and operating systems to meet its clients' needs, arguing that proof of this practice would require the CO to consider the qualifications of its other employees on the Alien's team. Although the Employer admitted that it needed such documentation to sustain its burden of proof, its rebuttal withheld the evidence that the NOF had requested, even though the identities and qualifications of all of the workers to whom it alluded were relevant, reasonably obtainable, and within its control. The Employer's failure to produce such relevant and reasonably obtainable documents is ground for the denial of certification.

STLO Corporation, 90 INA 007 (Sep. 9, 1991).¹³ As a result, the Employer's representations as to specific workers on whose qualifications it purported to rely were unsupported written assertions that lacked supporting reasoning or evidence. It follows that the Engineering Manager's statement was not sufficient to carry the Employer's burden of proof. **Inter-World Immigration Service**, 88 INA 490 (Sep. 1, 1989), citing **Tri-P's Corp.**, 88 INA 686 (Feb. 17, 1989).¹⁴

Conclusion. The Panel finds that the NOF provided sufficient notice of the reasons for

¹³This is particularly the case where the Employer is in the position of the employers in **Bakst International**, 89 INA 265 (Mar. 14, 1991), and **Personnel Sciences, Inc.**, 90 INA 043 (Dec. 12, 1990), who required applicants to have knowledge of specific computer hardware and software, which those employers failed to produce.

¹⁴As the Employer had in its possession the probative independent documentation which it refused, neglected, or otherwise failed to produce in compliance with the NOF directions of the Certifying Officer, the criteria of credibility in **Mr. and Mrs. Jeffrey Hines**, 88 INA 510 (Apr. 9, 1990), need not be considered in this matter.

the denial of certification, and that the Employer was told how to cure the defects found in its Application by the production of evidence supporting Employer's claim that its educational requirements were not unduly restrictive. As the Employer's rebuttal failed to sustain its burden of proof for the reasons discussed above, the CO correctly concluded that the evidence of record supported the denial of alien labor certification. Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of certifications is hereby affirmed.

For the panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case No.: 1999 INA 053

MAJESCO SOFTWARE, INC., Employer,
SANJAY TAPIDES MODI, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:	:
	:	CONCUR	:	DISSENT	:
	:	:	:	COMMENT	:
	:	:	:	:	:
Jarvis	:	:	:	:	:
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Huddleston	:	:	:	:	:
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Thank you,

Judge Neusner
Date: May 18, 1999